IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1945 of 1994

with

FIRST APPEAL No 2453 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

STATE OF GUJARAT

Appearance:

1. First Appeal No. 1945 of 1994
   MS MAYA N BHAVNANI for Petitioner No. 1
   Mr.A.Y.Kogje, learned A.G.P. for Respondent No. 1
2. First Appeal No. 2453 of 1994
   Mr.A.Y.Kogje, learned A.G.P. for Petitioner No. 1
   MR GT DAYANI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 19/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. First appeal no. 1945 of 1994 is filed by the original plaintiff under Sec. 96 of the Code of Civil Procedure wherein his claim is that the trial court was not justified in decreeing the suit in part for a sum of rs.1,43,000/- with interest and costs and that the full amount of Rs.3,71,000/- with interest and costs as claimed by him in the plaint should have been decreed. First appeal no. 2453 of 1994 is filed by the defendant against that part of the decree by which the original defendant is directed to pay a sum of Rs. 1,43,000/- along with interest at the rate of 12% p.a. from the date of suit till its realization. As both the appeals arise out of judgment and decree dated March 5, 1994 rendered by the learned 4th Jt.Civil Judge (S.D.), Godhra in Special Civil Suit no. 96/87, we propose to dispose them of by this common judgment.

2. The appellant in first appeal no. 1945/94 is an Engineer and a Contractor by profession. The defendant invited tenders for the work of constructing diversion road outside Dahod town on Ahmedabad-Godhra-Dahod-Indore road (S.M.No.61/A). The tender submitted by the plaintiff was found to be lowest and was therefore accepted and agreement in the usual P.W.D.form B/2/2D of 1984-85 was entered into between the plaintiff and Executive Engineer B & C division, Godhra. Thereafter, work order was issued to the plaintiff on October 22, 1984. It was stipulated in the said order that the work of constructing diversion road was to be completed by the plaintiff within 24 months from the date of work order. The case of the plaintiff was that the defendant had failed to hand over possession of the entire site where the work was to be carried out and committed breach of contract. According to the plaintiff, some portion of the site where work was to be carried out was in possession of the Forest Department and also private owners but no steps were taken by the Department to hand over possession of the site, as a result of which the work could not be completed in time. Further the grievance raised by the plaintiff was that the defendant had not made regular payment in respect of work done and

the problem of hard rock and soft rock which had cropped up during the execution of the construction work was resolved after unreasonable period resulting into loss to him. According to the plaintiff, because of the strike of Dy.Executive Engineers and other Government servants, the work could not be completed in time resulting into monetary loss to him. What was claimed by the plaintiff was that he had applied for extension of time to enable him to complete the work but the said prayer was unreasonably rejected by the defendant. According to the plaintiff, he was entitled to Rs.96,000/- on account of work done for which no amount was paid to him and was also entitled to Rs.68,000/- which he had paid by way of security deposit. The case of the plaintiff was that the department had wrongly and illegally deducted and made part-rate payment to him and on that count he was entitled to a sum of Rs.5,000/- and that as he was compelled to take excavated earth beyond the stipulated load of 200 mtrs. as well as compelled to spread earth beyond stipulated load, he was entitled to a sum of Rs.10,000/- as he had incurred extra expenditure. According to the plaintiff, he was required to cart hard murrum from outside area and as he had incurred an expenditure of Rs.2,000/- in unloading and filling, he was entitled to the said amount. As per his case, he was prevented by the department from executing the work and therefore was entitled to a sum of Rs.50,000/on account of overhead charges of man, machineries and labour. Further, his case was also that because of the breach of contract committed by the defendant, he could nor earn 20% profit and was entitled to loss of profit at the rate of 20% on unexecuted work which was worth Rs. 7 lakhs. Under the circumstances, the plaintiff filed Special Civil Suit no. 96/87 in the court of learned 4th Jt.Civil Judge (S.D.) at Godhra District Panchmahals and prayed the Court to pass a decree for Rs.3,71,000/against the defendant with interest at the rate of 18% p.a. from the date of the suit till realization and costs.

3. On service of summons, the defendant filed written statement at exh. 17 contending interalia that possession of only a small portion of land could not be handed over to the plaintiff but the plaintiff was never prevented from executing work in the remaining length and was therefore not entitled to the decree claimed in the plaint. According to the defendant, plaintiff had failed to give programme of the work which was required to be completed within the stipulated period of two years and as the plaintiff had failed to carry out work worth Rs. 61,615/- per month though it was so assured in letter dated October 5, 1984 the suit was liable to be

dismissed. What was pleaded by the defendant in the written statement was that the work awarded to the plaintiff was below 20.22% of the estimated cost of the tender and as he wanted to get out of the contract under false pretext, the suit should not be allowed. The defendant explained that though the work of soft and hard rock was covered under Clause-40 of the contract, the plaintiff had not shown his willingness to carry out the said work from the beginning as a result of which the said work was required to be carried out through another agency and as the plaintiff himself had committed breach of the contract, the suit should be dismissed. After denying that the progress of the work was hampered by the department or on account of failure of the department to perform its contractual obligation, it was pointed out that the plaintiff could have solved problems like laying of the irrigation pipe etc. by mutual negotiation and as the plaintiff had failed to solve the same by mutual negotiation, the plaintiff was not entitled to the decree as claimed for. The defendant pleaded in the written statement that having regard to the facts of the case, the defendant was justified in rejecting application of the plaintiff for extension of time to execute the work which cannot be regarded as illegal and as time was essence of the contract, the plaintiff was not entitled to the decree. According to the defendant, the plaintiff had no intention right from the beginning to carry out the work nor his planning was proper and as he had completely stopped the work in May 1986 and executed work only to the extent of Rs.6,51,233/-, the suit should be dismissed. It was pointed out by the defendant in the written statement that as the plaintiff himself had abandoned the work which was in incomplete stage and as remaining work was required to be carried out at the risk and cost of the plaintiff, security deposit was not refundable to him nor was he entitled to any amount on the basis of part-rate deduction nor entitled to claim for any extra work nor to loss of profit at the rate of 20% of the amount of work inexecuted. By filing written statement, dismissal of the suit was demanded by the defendant.

4. Having regard to the pleadings of the parties, necessary issues for determination were raised by the trial court vide exh. 19. On behalf of the plaintiff, Mr.R.R.Agrawal who was his Power of Attorney Holder was examined at exh. 33 whereas on behalf of the defendant, Mr.P.B.Soni was examined at exh. 67 and Mr.P.G.Shah was examined at exh. 70. The documentary evidence was also produced by the parties in support of their respective claims.

5. On appreciation of evidence adduced by the parties, the trial court held that it was proved by the plaintiff that the defendant had committed breach of contract by not giving possession of the site and by not making payment regularly. It was further held that it was proved by the plaintiff that the dispute regarding soft rock and hard rock which had cropped up during the execution of the work was not decided timely by the defendant. According to the learned Judge, it was proved by the plaintiff that the time was not the essence of the contract nor it was made essence of the contract subsequently and that contract created mutual, bilateral, reciprocal obligations. It was concluded by the trial court that it was not proved by the defendant that plaintiff had committed breach of the contract and that the plaintiff was entitled to refund of Rs.68,000/- which was paid by him as security deposit as well as Rs.5000/as the defendant had wrongly and illegally deducted the same and made part rate payment to the plaintiff. Further, according to the learned Judge, the value of the unexecuted work was Rs. 7 lakhs and that the plaintiff was entitled to a sum of Rs.1,40,000/- for loss of profit at the rate of 20%. In ultimate conclusion, the learned Judge has partly allowed the suit by holding that the plaintiff is entitled to recover a sum of Rs.1,43,000/along with interest at the rate of 12% p.a. from the date of suit till its realization from the defendant vide judgment and decree dated February 5, 1994 which has given rise to these two appeals.

6. Mr.A.Y.Kogje, learned counsel of the defendant submitted that that the finding that the defendant had committed breach of contract is not well-founded and deserves to be set aside. According to the learned counsel, the concerned department had not failed in discharging its obligation to give possession of the entire site of the work for execution and as possession of the major portion of the land was handed over to the defendant to enable him to carry out the work, the finding that the department had failed to hand over possession of the site should be set aside. According to the learned counsel of the State Government, it was never pointed out by the plaintiff during the execution of the work that he was not in a position to carry out the work if possession of two parcels of the land mentioned in the judgment was not handed over to him and as this was merely an excuse by plaintiff for not carrying out the work at a later stage, the suit should have been dismissed by the trial court. What was emphasized on behalf of the Government was that not only lay out was

given to the plaintiff as indicated in letter dated November 6, 1984 and that the plaintiff had started work within 15 days but the first running bill was also paid to him in December, 1984 and therefore it was wrong to hold that the defendant had committed breach of the contract. After pointing out that it was the duty of the plaintiff to give his programme as mentioned in letter dated October 5, 1984 and carry out work worth Rs.61,615/- for each month, it was pleaded that the plaintiff had failed to carry out the work as per the programme and therefore it was the plaintiff who had committed breach of the contract and not the defendant. The learned counsel of the defendant drew the attention of the Court to clause-40 of the contract and contended that as the plaintiff was bound to carry out work of soft and hard rock, the claim based on those two items should not have been accepted by the trial court by holding that the issue regarding the same was decided by the department at a later stage resulting into breach of contract by the defendant. It was argued that the plaintiff had completely stopped the work in May 1986 and executed the work only to the extent of Rs.6,51,233/- as against work of Rs.14,78,782/- which was required to be completed under the contract and as the plaintiff himself has committed breach of the contract, the suit should have been dismissed. According to the learned counsel, the plaintiff himself had abandoned the work in its incomplete stage and therefore was not entitled to refund of security deposit nor to the other amounts awarded by the trial court and therefore the appeal filed by the State should be accepted by the court.

7. Mr.G.T.Dayani, learned counsel of the original plaintiff contended that the finding that the defendant had committed breach of the contract is well-founded and should not be interfered with by this court in instant appeal. According to him, the contents of exh. 35,36,37,38,39,40,41,42,43,44,45 & 46 would indicate that the department had failed to hand over possession of the site to the plaintiff to enable him to execute the work and that starting point from which the work was to be executed was never fixed. What was emphasized was that hinderances created by original owners whose lands were acquired by the Government were never removed nor electric poles on the site were removed and that the work could not be carried out in time because of strike of the Government employees including officers working in the office at Dahod and therefore the finding that the defendant had committed breach of contract should be upheld by the court.

8. We have considered the rival submissions advanced at the bar and reappreciated the documentary as well as oral evidence adduced by the parties before the trial court. It is relevant to notice that the plaintiff was issued work order on October 22, 1984 and by letter dated October 23, 1984 which is produced at exh. 34, he was called upon to complete the same within 24 months from the date of work order. However, while executing the work, the problem of hard rock and soft rock had cropped up. Therefore, by addressing letter dated December 26, 1984 which is produced at exh. 35, the plaintiff had sought instructions regarding the same from the department but surprisingly no reply at all was given by the defendant to the said letter. The record would indicate that it was the duty of the department to give further line out to enable the plaintiff to execute the work. For this purpose, he had engaged necessary personnel for supply of earth but their services could not be utilized by the plaintiff because further line was not given by the department. Moreover, land in which school run by Movalia Agriculture Centre was housed was fenced and its possession was never handed over to the plaintiff. Therefore, the plaintiff had addressed a letter dated January 10, 1985 which is produced at exh. 36 requesting the competent officers to do needful in the matter but this letter was also not replied to by the defendant. Even after the receipt of letter dated January, 10, 1985 no steps were taken by the officers of the defendant to fix starting point from which the work was to be executed and this was necessary because execution of the work from the starting point which was earlier fixed by the department belonging to Forest department was stopped by the officers of the forest department. Therefore, another letter dated March 12, 1985 was addressed by the plaintiff to the officers requesting them to do needful in the matter so that the work could be executed immediately. However, even after receipt of this letter no steps worth the name were taken by the officers of the department. As the land belonging to Movalia Agriculture Centre was not handed over, the plaintiff was required to execute the work in pieces. Moreover, on the site there was an electric pole which was not removed and therefore also he was required to execute earth work in pieces. As the officers of the defendant had failed to fix initial point from which the plaintiff was required to execute the work, he had no option but to leave the piece of land admeasuring 200 mtrs. before executing the other work. Under the circumstances, he addressed another letter dated May 13, 1985 which is produced at exh. 38 and again requested the officers of the defendant to do needful in the

matter. However, even after receipt of this letter, no steps were taken by the officers at all nor any reply was given to the same. The record would indicate that the Dy.Executive Engineers and other officers of the State Government had gone on strike during the relevant period which had continued for about three months, as a result of which no instructions could be given by the officers of the defendant regarding execution of the work in question to the plaintiff and the plaintiff had to incur expenditure on idle establishment. Therefore, he had addressed a letter dated June 20, 1985 which is produced at exh. 39 pointing out his difficulties and again requested the officers of the defendant to fix initial point from which he was supposed to carry out the work and take appropriate steps for the purpose of handing over possession of land belonging to Movalia Agriculture Centre but surprisingly no steps worth the name were taken nor any attention was paid to this letter. It is relevant to notice that as the problems faced by the plaintiff were not solved by the defendant, the execution of the work had to be suspended for a period of about two months and after the resumption of the work, the plaintiff had addressed a letter dated August 25, 1985 which is produced at exh. 40 requesting the officers of the respondent to solve the five difficulties mentioned therein but no heed was paid to this letter also. During the course of execution of the work, it was found by the plaintiff that on some land crop was grown by the owners and they were not permitting the plaintiff and his men to enter the land and were quarrelling with the men engaged by the plaintiff. Under the circumstances, by letter dated October 10, 1985 which is produced at exh. 41, the plaintiff had requested to do needful in the matter and give the clear possession of the land to him so as to enable him to execute the work but inspite of receipt of the letter, no steps were taken by the officers of the defendant to hand over clear possession of the land. This difficulty was again pointed out by the plaintiff vide letter dated October 10, 1985 which is produced at exh. 42 but this letter was also ignored by the officers of the defendant. By letter dated February 7, 1986 which is produced at exh. 43 the plaintiff had pointed out that he had completed work of collection of metal to be spread on the land from zero mtrs. to 2300 mtrs. and that he should be permitted to spread the same. This request was repeated by him vide letter dated May 2, 1986 which is produced at exh. 44 and letter dated June 10, 1986 which is produced at exh. 45 but no permission to spread the metal collected was granted to him. Further, during the execution of the work, the problem of cutting soft rock, hard rock and placing irrigation pipe and as

making siphon had cropped up which were entrusted by the defendant to other agencies. The record does not indicate as to when these works entrusted to other agencies were completed. However, it is an admitted position that the work of cutting soft rock and hard rock as well as placing of irrigation pipe and making of siphon was never completed within the time by which the plaintiff was expected to complete the work in question. The reliance placed on clause 40 of the contract is misplaced because no letter was ever addressed by the officers of the defendant to the plaitniff pointing out that it was the duty of the plaintiff to carry out work of soft and hard rock. If it had been the duty of the plaintiff to carry out work of soft and hard rock, the officers of the defendant would not have entrusted the same to other agency and in case would have claimed damages from the plaintiff by filing counter claim. Further, till September 10, 1986 the plaintiff was never provided with formation level till the last point and therefore he had addressed a letter dated September 10, 1986 which is produced at exh. 46 requesting the officers to do needful in the matter but inspite of receipt of letter, no steps at all were taken by the officers of the defendant so as to enable the plaintiff to complete the work.

9. The defendant has produced certain letters on record of the case. However, they are of subsequent dates and were never addressed to the plaintiff at the relevant time. Therefore, they are not relevant for the purpose of deciding the question as to whether the plaintiff has committed breach of contract or defendant has committed breach of contract. The contents of letters which have been referred to above unerringly establish that the defendant had committed breach of contract (1) by not handing over clear possession of the land to the plaintiff, (2) by not fixing the starting point from which the work was to be executed, (3) by not taking appropriate steps when the plaintiff was prevented by the officers of the forest department from executing the work, (4) by not removing the wire fencing placed on the land belonging to Movalia Agriculture Farm, (5) by not removing the electric pole, (6) by not solving the problems of hard rock and soft rock, (7) by not giving proper instructions to the plaintiff during the time when officers of the State Government were on strike, (8) by not granting permission to the plaintiff to spread metal though he had completed the work of collecting metal long ago, (9) by not providing irrigation pipe and getting siphon made through another agency in time, (10) by not providing formation level till the last point etc. Under

the circumstances, this court is of the firm opinion that the trial court did not commit any error in holding that it was proved by the plaintiff that the defendant had committed breach of the contract and that defendant had failed to prove that breach of contract was committed by the plaintiff. The learned Judge of the trial court has discussed this question in great detail which is quite evident from paragraphs 15 to 18 of the impugned judgment and given cogent and convincing reasons for coming to the conclusion that the defendant had committed breach of contract with which this court concurs. Thus, there is no substance in the argument of learned A.G.P. that the finding recorded by the trial court to the effect that the defendant had committed breach of contract should be set aside. Therefore the contention is hereby rejected.

10. This brings the court to the question of amount of compensation to be awarded to the plaintiff. Mr.G.T.Dayani, learned counsel of the appellant on instructions of the appellant has stated at the bar that appellant is not pressing claim of Rs.10,000/- advanced under the head that he was compelled to take excavated earth beyond the stipulated load of 200 mtrs. and was compelled to spread the said earth beyond the stipulated load of 200 mtrs. Learned counsel further states at the bar that the appellant is also not pressing his claim for Rs.2,000/- on the ground that the plaintiff was required to cart hard murrum from outside area and to unload it for the purpose of road filling. Learned counsel has further stated that the plaintiff does not press his claim for Rs.50,000/- advanced on account of overhead charges incurred on man, material and machineries for the purpose of execution of the work. In view of the statements made at the bar, above-referred to claims stand rejected as not pressed.

11. It was the contention of Mr.G.T.Dayani, learned counsel of the plaintiff that the plaintiff is entitled to a sum of Rs.96,000/- on account of work done and not recorded. According to the learned counsel, exh. 51 shows the amount of work done but not recorded in final bill prepared by the department and as final bill does not indicate as to how measurements mentioned in exh. 51 are recorded and paid the claim of Rs.96,000/- should have been allowed by the trial court. What was emphasized by the learned counsel of the appellant was that the witness examined by the plaintiff was not cross-examined by the defendant with regard to claim advanced on account of work done and not paid and therefore the same should have been accepted by the trial court. In our view, the claim on account of work done

and not paid is rightly rejected by the trial court and plaintiff is not entitled to a sum of Rs.96,000/-on the said count. It is relevant to notice that plaintiff has relied upon for this claim only on the statement prepared by him which is produced at exh. 51. It is pertinent to note that the plaintiff has not cared to cross-examine the witnesses of the defendant on this count. Not only that the plaintiff could not produce any letter before the trial court to show that before filing the suit, he had written to the department indicating particulars of work done by him for which he was not paid. What is important is that the plaintiff has admitted that the final measures for all the completed work was taken by the department and for the said work he has been paid. The defendant produced bills vide exh. 20 and on perusal of the same it becomes evident that plaintiff was paid for the work executed by him. In our view, the plaintiff would not be entitled to a sum of Rs.96,000/- which is based on statement prepared by him. As the claim for Rs.96,000/- is rightly rejected by the trial court and as rest of the claims which are not awarded are not pressed by the learned counsel of the appellant, First Appeal no. 1945/94 filed by the original plaintiff is liable to be dismissed.

12. The plea raised by the learned A.G.P. that the trial court has committed error in refunding the amount of Rs.68,000/- paid by the plaintiff by way of security deposit and therefore to that extent the decree should be set aside has no substance. In the earlier part of the judgment, this Court has come to the conclusion that the trial court was justified in recording a finding that the defendant had committed breach of contract. Normally, security deposit is collected to ensure due performance of contract. In ordinary course, a security deposit is intended to be refunded and the amount in question is received by the Department only as a deposit for the purpose of securing due performance of the contract. As the plaintiff was ready and willing to perform his part of the contract and as he was prevented from doing so, because of breach of contract committed by the defendant, the plaintiff would be entitled to refund of security deposit. Therefore, the finding recorded by the trial court that the plaintiff is entitled to recover a sum of Rs.68,000/- paid by him to the defendant by way of security deposit cannot be interfered with in instant appeal and is hereby upheld.

13. The plea that a sum of Rs.70,000/- should not have been awarded by the trial court being 10% of value of unexecuted work and therefore the impugned decree

should be modified is devoid of merits. The fact that the value of the unexecuted work was to the extent of Rs. 7 lakhs is not disputed by the defendant. The case of the plaintiff was that if he had been permitted to execute the work, he would have earned 20% interest on full execution of the work. His claim before the trial court was that he was entitled to a sum of Rs.1,40,000/being 20% of the value of the unexecuted work for loss of profit. But the trial court has awarded 10% as loss of profit on the cost of unexecuted work.

14. In Mohammed Salamtullah and others V/s Government of Andhra Pradesh reported in AIR 1977 S.C.1481, the Supreme Court has held that the assessment of damages for breach of contract based on estimated profits is permissible and that assessment of damages at 10% of the unexecuted work would be correct formula to be adopted. In M/s A.T/Brij Paul Singh & Bros. V/s State of Gujarat reported in AIR 1984 S.C. 1703, it is ruled that in case of works contract, the contractor is entitled to claim damages on basis of expected profit on balance of works contract, if it is found that breach of contract was committed by the Government. In the said case, the High Court had directed damages to be paid at the rate of 15% on balance of works contract, and the Supreme Court did not interfere with the said direction of the High Court. In Dwarkadas V/s State of Madhya Pradesh & Anr. reported in AIR 1999 S.C. 1031, it was found that the contract was illegally rescinded by Government. The contractor had advanced claim for recovery of amount as damages as expected profit out of contract which was disallowed by the High Court. The Supreme Court has held that such a claim cannot be disallowed on the ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract and that the Contractor would be entitled to damages which may be assessed at 10% of the unexecuted contract. Thus, the direction given by the trial court to the State Government to pay a sum of Rs.70,000/- on account of loss of profit for the breach of contract committed by the defendant cannot be regarded as illegal and is in consonance with the principles laid down by the Supreme Court referred to in the above-quoted decisions. Therefore, the plea that award of Rs.70,000/by way of damages on account of loss of profit is illegal and requires to be set aside has no substance and is hereby rejected.

15. The trial court has awarded sum of Rs.5,000/- on account of wrong and illegal deduction of the amount payable to the plaintiff. This part of the decree is not

seriously challenged on behalf of the Government and therefore the award of Rs.5,000/- is hereby upheld. No other contention except the contentions referred to above have been raised by the learned counsel of the respective parties in support of their respective appeal.

16. The net result of the above discussion is that this Court does not find any substance in the State appeal and the same is also liable to be dismissed.

17. For the foregoing reasons, both the appeals fail and are dismissed. There shall be no orders as to cost all throughout.

(J.M.PANCHAL, J)

(SHARAD D DAVE, J)

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